UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

US EPA RECORDS CENTER REGION 5
506891

United States of America,

Plaintiff,

and

State of Minnesota, by its Attorney General Warren Spannaus, its Department of Health, and its Pollution Control Agency,

Plaintiff-Intervenor,

vs.

Reilly Tar & Chemical Corporation; Housing and Redevelopment Authority of St. Louis Park; Oak Park Village Associates; Rustic Oaks Condominium Inc.; and Philips Investment Co.,

Defendants,

and

City of St. Louis Park,

Plaintiff-Intervenor,

vs.

Reilly Tar & Chemical Corporation,

Defendant.

No. Civ. 4-80-469

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT REILLY TAR & CHEMICAL CORPORATION'S MOTION TO DISMISS THE COMPLAINT OF PLAINTIFF UNITED STATES OF AMERICA

INTRODUCTION AND SUMMARY OF ARGUMENT

This suit has been brought by the United States of America on behalf of the Administrator of the United States Environmental Protection Agency under the provisions of § 7003 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6973.

This brief is submitted on behalf of defendant Reilly Tar & Chemical Corporation ("Reilly Tar") in support of its Motion to Dismiss for failure to state a claim upon which relief may be granted and for lack of subject

matter jurisdiction. The position of defendant Reilly Tar, in sum, is as follows. First, § 7003 is jurisdictional only and provides no standards of liability. Liability under the statute is based upon the federal common law of nuisance which is applicable only to alleged pollution having interstate effects. No interstate effects are alleged here. Second, the statute by its terms is limited to actions "to immediately restrain any person contributing to such handling, storage, treatment, transportation or disposal . . . ." Since Reilly Tar ceased its operations in 1972, there is nothing to enjoin. Third, the authority to sue is limited to situations in which a current activity may present an imminent and substantial endangerment to health or the environment. Here, however, there is neither a current activity nor the threat of an emergency. The alleged problems in St. Louis Park have been known to City and State officials for many years. They have not worsened and there is no emergency; rather, St. Louis Park has simply stopped using those municipal wells where measurable quantities of polynuclear aromatic compounds have been detected.

Thus, § 7003 does not provide authorization for or jurisdiction over this lawsuit. Because the suit is thus not authorized by act of Congress, neither does 28 U.S.C. § 1345 provide jurisdiction. And because there is no federal common law to apply absent an interstate effect, the instant claim does not arise under the laws of the United States, and thus no jurisdiction is provided by 28 U.S.C. § 1331. Therefore, this court lacks jurisdiction over the subject matter of this suit.

In addition, the extraordinary relief sought in Paragraphs 3 through 9 of the Prayers for Relief stated in the Complaint goes beyond the authority to address an emergency situation conferred by § 7003. Accordingly, these paragraphs of the Prayers for Relief should be dismissed as unauthorized by § 7003, under which this suit was brought.

STATEMENT OF FACTS

Reilly Tar is an Indiana corporation whose home office is in Indianapolis, Indiana. From 1917 to 1972, it operated a creosote refinery and a wood preservative plant in St. Louis Park, Minnesota. During part of this period, the plant operated under the name Republic Creosote Company. Sometime during these fifty-five years, an unknown amount of waste from its operations accumulated on and adjacent to its 80 acre site in the following manner.1/

A creosote refinery produces creosote oil from coal tar. Coal tar is a derivative of coal and for many years was used extensively in the State of Minnesota, including Twin City suburbs, for road surfacing and other purposes. The refining process is basically an evaporation-distillation process in which heat is utilized to separate the water from the coal tar and then is used to separate the lighter oils from heavier oils and pitches. During the early years of the plant's operations, the waters inherent in the coal tar which were thus removed (called the "wet cut") were transported to a ditch which led to a swamp south of the plant. In later years (commencing 1940-41) the wet cut was condensed and treated

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1/ This Statement of Facts is support by the attached Affidavit of Carl F. Lesher.

before discharge and was also sent to a wood-lined settling basin as hereafter described. Pipes which carried tar, oil or a mixture of tar, oil and water were, for most of the plant's lifetime, set in concrete trenches so that any of these liquids which might inadvertently leak from a pipe, would be caught and could be retrieved.

Creosote oil produced in the refinery was either sold or utilized in Reilly's own wood treatment plant, located on the same 80 acre site in St. Louis Park. Creosote oil for many years has been the most widely used wood preservative for railroad ties, underground pilings, telephone poles, etc., and for this use is a registered pesticide. Thus its contemplated use involves depositing it in or on the soil where it is intended to remain for many years. Creosote oil has also been used by many persons, including state and local governments, as a weed killer. It was applied to ties and poles in St. Louis Park in the following manner. Ties and poles to be treated were loaded on small, narrow-gauge railroad cars (trams) and carried inside large metal cylinders (6 feet in diameter by 176 feet in length) which were then tightly closed. Creosote oil was introduced into the tank and enough pressure created so that the wood would be thoroughly impregnated. Thereafter, before the loaded trams were pulled from the cylinder, a vacuum was drawn to eliminate waste so that the wood when withdrawn was virtually dry. Although creosote oil might drip from the cylinder, it was set in a concrete basin so that most of any waste oil would be caught in the basin and could be retrieved. Treated ties were stored on the site until needed by their owners.

In 1940-1941 a wood-lined settling tank was constructed near the wood treatment facilities. This settling tank utilized the principle of gravity separation assisted by wooden baffles upon which waste was collected. The waters on the surface were allowed to escape into a drain tile which replaced the open ditch. In 1951, a straw filter was added following the settling basin to further cleanse the waste water. The waters eventually emptied into the swamp previously mentioned.

Over many years of the plant's operations, commencing at least as early as the 1930's, there was friction between the officials of St. Louis Park and Reilly concerning alleged odors emitted by the plant and alleged surface and groundwater contamination. One of the earliest episodes of such friction was the claim made in 1933 that Reilly's operations had resulted in the contamination of a municipal well driven by the City.

In 1960, the City commenced upon a course of conduct designed to eliminate Reilly and acquire the site for the City. For example, a housing and redevelopment authority was created by the City for the purpose of acquiring Reilly's property. But the attempt was abandoned following an adverse ruling by the Minnesota Supreme Court. See Reilly Tar & Chemical Corp. v. St. Louis Park, 265 Minn. 295, 121 NW2d 393 (1963). Thereafter, the City determined to take a portion of Reilly's property by condemnation in order to extend Louisiana Avenue, a street adjacent to part of Reilly's property. This taking would have eliminated the railroad access and made the land unusable for a refinery or wood treatment plant. In 1970, St. Louis Park and the Minnesota Pollution Control Agency

commenced an action in Hennepin County District Court for a permanent injunction restraining Reilly from continuation of the activities which allegedly were causing air and water pollution.

In 1972 Reilly agreed to stop all of its activities. In a settlement agreement executed on April 14, 1972, Reilly agreed to stop all of its activities and to sell its property to St. Louis Park. St. Louis Park, in turn, agreed to accept the property "as is" free from any "questions of soil and water impurities and soil conditions. . . ." Although in that agreement, the City agreed to deliver dismissals with prejudice of the litigation to be executed by both the City and the State, when the time arrived to close the settlement, the State declined to dismiss, expressing the view that the exact extent of the remedial measures had not yet been ascertained. Accordingly, St. Louis Park and Reilly entered into another agreement, executed June 19, 1973 that the City would hold Reilly "harmless from any and all claims which may be asserted against it by the State of Minnesota, acting by and through the Minnesota Pollution Control Agency, and will be fully responsible for restoring the property, at its expense, to any condition that may be required by the Minnesota Pollution Control Agency."

In April, 1978, the Minnesota Pollution Control Agency filed an "amended" complaint, alleging, among other things, groundwater pollution evidenced by allegedly elevated levels of polynuclear aromatic hydrocarbons (PAH's) in certain wells in St. Louis Park. Although Reilly resisted the amendment of the complaint, that action is still pending and the parties have served and answered

lengthy interrogatories and produced for inspection many thousands of documents.

Since 1972 Reilly has conducted no activities in the State of Minnesota. Since 1972 it has done nothing in Minnesota which one could consider as "handling, storage, treatment, transportation, or disposal of any solid waste or hazardous waste." It is not handling, storing, treating, transporting or disposing of any waste at the present time, nor does it contemplate doing so.

The possible existence of PAH's in certain of the St. Louis Park municipal wells has been known to the Minnesota Pollution Control Agency and the City since at least 1974. The response of the City has been to take out of operation those wells where PAH's have been detected. Thus, no ground water reflecting any signs of PAH's is being utilized for drinking water in St. Louis Park.

ARGUMENT

Section 7003 is jurisdictional only and creates no substantive liability.

This suit has been brought by the federal government under § 7003 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6973, which, as amended by the Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482 (Oct. 21, 1980)("1980 Amendments"),[2/] provides:

2/ Prior to amendment by § 25 of the 1980 Amendments on October 21, 1980, RCRA § 7003 provided as follows:

> Notwithstanding any other provision of this chapter, upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste is presenting an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court to imme-

(a) AUTHORITY OF ADMINISTRATOR.--Notwithstanding any other provision of this chapter, upon receipt

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2/ (Continued)
diately restrain any person contributing to the alleged disposal, to stop such handling, storage, treatment, transportation, or disposal or to take such other action as may be necessary. The Administrator shall provide notice to the affected State of any such suit.

RCRA § 7003, Pub. L. No. 94-580, 90 Stat. 2826 (1976), as amended by § 7(q) of the Quiet Communities Act of 1978, Pub. L. No. 95-609, 92 Stat. 3083 (1978).

Section 25 of the 1980 Amendments made the following changes:

SEC. 25. Section 7003 of the Solid Waste Disposal Act is amended by--

(1) inserting "(a) AUTHORITY OF ADMINISTRATOR--" after "7003";

(2) striking out "is presenting" and inserting in lieu thereof "may present";

(3) striking out "the alleged disposal" and inserting in lieu thereof "such handling, storage, treatment, transportation or disposal"; and

(4) adding the following at the end thereof: "The Administrator may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.

"(b) VIOLATIONS.--Any person who willfully violates, or fails or refuses to comply with, any order of the Administrator under subsection (a) may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $5,000 for each day in which such violation occurs or such failure to comply continues."

As discussed infra, the change from "is presenting" to "may present" was meant only to affect the Administrator's burden of proof. Accordingly, Reilly Tar assumes, arguendo, that the changes in § 7003 relevant to this suit are procedural only and therefore apply to this pending litigation. See Kroger v. Ball, 497 F.2d 702 (4th Cir. 1974); Rosen v. Savant Instruments, Inc., 264 F. Supp. 232 (E.D. N.Y. 1967). If, however, they were more than procedural and created a remedy in § 7003 where none existed before, then they would not be applicable to pending litigation. See Shielcrawt v. Moffett, 294 N.Y. 180, 61 N.E.2d 435 (1945); 73 Am.

> of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person contributing to such handling, storage, treatment, transportation or disposal, to stop such handling, storage, treatment, transportation, or disposal or to take such other action as may be necessary. The Administrator shall provide notice to the affected State of any such suit. The Administrator may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.
>
> (b) VIOLATIONS.--Any person who willfully violates, or fails or refuses to comply with, any order of the Administrator under subsection (a) may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $5,000 for each day in which such violation occurs or such failure to comply continues.

At the outset, it must be recognized that § 7003, upon which this suit is based, itself provides for no substantive liability. It is purely jurisdictional in nature, stating the special situations in which Congress has authorized the Administrator of EPA to go to court to seek equitable relief. This limitation is apparent both from the terms of the section itself and from the structure of the Act of which it is a part.

The Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2796 (1976) ("RCRA"), was conceived as "a multifaceted approach toward solving the problems associated with the 3-4 billion tons of discarded materials generated each year, and the problems

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2/ (Continued)
Jur.2d Statutes § 354, p. 490 (1974). Cf. Howard v. Allen, 368 F. Supp. 310, 315 (D.S.C.), aff'd, 487 F.2d 1397 (4th Cir. 1973), cert. denied, U.S. 912 (1974) (distinguishes mere change in procedure from creation of new remedy).

resulting from the anticipated 8% annual increase in the volume of such waste." H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. 2 (1976), reprinted in [1976] U.S. Code Cong. & Ad. News 6238, 6239. The Act authorizes federal activities in four areas:

> Comprehensive solid waste management, regulation of hazardous waste disposal, assistance for resource recovery, and utilization and assistance for resource conservation.

122 Cong. Rec. S21401 (daily ed. June 30, 1976) (remarks of Sen. Randolph).

The regulatory heart of the Act is subtitle C, "Hazardous Waste Management". This subtitle establishes a detailed regulatory scheme applicable to generators and transporters of hazardous waste and owners and operators of hazardous waste treatment, storage, and disposal facilities. The EPA is directed to develop and promulgate criteria and regulations identifying characteristics of hazardous wastes in general and listing certain hazardous wastes in particular. RCRA § 3001, 42 U.S.C. § 6921. Regulations setting up recordkeeping requirements and performance standards are also to be issued, RCRA §§ 3002-3004, 42 U.S.C. §§ 6922-6924, and a system of permits is to be established. RCRA § 3005, 42 U.S.C. § 6925. These regulations, however, which were to have been promulgated within 18 months of the Act's passage, RCRA § 3004(b), 42 U.S.C. § 6930(b), were not to become effective until six months after their promulgation.3/ Id. Once effective, the standards established by EPA may

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3/ The principal subtitle C regulations were not promulgated, however, until this year, and were not effective until November 19, 1980. See 45 Fed. Reg. 33066 et seq. (May 19, 1980).

be enforced, through court order if necessary. RCRA § 3008, 42 U.S.C. § 6928.

In marked contrast to these coordinated regulatory provisions of subtitle C, subtitle G, aptly named "Miscellaneous Provisions", contains diverse sections dealing with topics ranging from "Employee Protection", RCRA § 7001, 42 U.S.C. § 6971, to "Grants or Contracts for Training Projects", RCRA § 7007, 42 U.S.C. § 6977. Tucked amid this potpouri is the "Imminent hazard" section, RCRA § 7003.

In essence, § 7003 states no more than that, "upon receipt of [certain] evidence, . . . the Administrator may bring suit [against certain persons to obtain certain relief]." It does not purport to establish standards of liability and is not coordinated with the regulatory scheme of subtitle C. In fact, it is immediately adjacent to the Act's grant of standing for certain "citizen suits", RCRA § 7002, 42 U.S.C. § 6972.

Thus, both the wording and placement of § 7003 establish its jurisdictional nature, and the courts which have interpreted it to date have so held. In United States v. Midwest Solvent Recovery, Inc., 484 F. Supp. 138 (N.D. Ind. 1980), the court acknowledged that "the Legislature's explanation of the purpose and effect of § 7003 is quite sketchy," and noted the failure of "the Legislative history of § 3004 of the Act, 42 U.S.C. § 6924, a provision prescribing performance standards for owners and operators of hazardous waste treatment, storage, and disposal facilities, [to] identify the reasons why Congress enacted § 7003." Id. at 143. The court then held "for a

number of reasons that § 7003 of the Act is in purpose only jurisdictional." Id.

> First § 7003 is not a part of Subchapter 2 of the Act, a group of provisions which sets down duties which must be discharged if liability under the Act is to be avoided. Rather, § 7003 is placed in Subchapter 7 of the Act and is described in the Act as a "miscellaneous" provision. Second, the section that immediately precedes § 7003 is a private attorney general provision that confers standing for purposes of enforcing the Act upon any "person," as that term is defined in § 1004(15) of the Act, 42 U.S.C. § 6903(15). Section 7002 does not, however, confer standing for this purpose upon the United States. Because the drafters of the Act would have been impelled by logic to organize the Act so as to place provisions relating to standing and jurisdiction in the same portion of the Act, the placement of the provision entitled § 7003 in immediate proximity to the provision entitled § 7002 is further evidence that § 7003 was not meant to create substantive tests of liability under the Act. Third, because § 7003 is as broadly worded as it is, if it were intended to function as a liability-creating provision, it would appear to make liable even those who contribute to the handling, storage, treatment, transportation or disposal of solid or hazardous wastes in such a way that an imminent and substantial endangerment to health or the environment is created. Any provision that could logically be read so to expand the set of persons liable under the federal solid and hazardous waste regulatory scheme would surely be identified as such in the legislative history. Finally, the Act elsewhere establishes by regulations the standards of conduct that must be followed by those who generate, transport, or own or operate facilities that treat, store, or dispose of hazardous wastes. 42 U.S.C. §§ 6922, 6923, and 6924.

Id. at 143-144.

In the only other decision expressly dealing[4/] with this issue, the court in United States v. Solvents Recovery Service of New England, et al., 496 F. Supp. 1127 (D. Conn. 1980), found the reasoning of the Midwest Solvent court "persuasive." Id. at 1133. The Solvents

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4/ The court in United States v. Vertac Corporation, 489 F. Supp. 870 (E.D. Ark. 1980), did not address this question.

Recovery court held that § 7003 "provides a jurisdictional basis and an enforcement device," but "does not itself establish standards for determining the lawfulness of the conduct of those sued by the United States." Id. at 1133-1134. If the jurisdictional requirements of § 7003 have been met, the applicable standards of liability might be found, in an appropriate case, in the regulations promulgated under RCRA, or in the federal common law of nuisance. United States v. Midwest Solvent Recovery, Inc., supra, 484 F. Supp. at 144; United States v. Solvents Recovery Service of New England, supra, 496 F. Supp. at 1134.

Section 7003 is Limited to Injunctive Actions to Restrain Ongoing Activities.

Section 7003, although it confers standing to sue on the Administrator, is not a blanket grant of authority to seek relief through the courts. The "tests identified in § 7003 are . . . evidentiary tests which, if satisfied, permit the Administrator to petition in some situations for immediate injunctive relief." United States v. Midwest Solvent Recovery, Inc., supra, 484 F. Supp. at 144. The instant suit fails several of these tests, as reference to the language of the statute and the legislative history shows.

By its terms, § 7003 does not authorize the instant suit

"[C]ases of statutory construction . . . begin, of course, with the language of the statute. Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979). And 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.' Perrin v. United States, U.S. , (1979),"

Diamond v. Chakrabarty, U.S. , , 48 U.S.L.W. 4714, 4715 (June 16, 1980).

Under the terms of § 7003, the Administrator may not file suit until he has received evidence "that the handling, storage, treatment, transportation or disposal of any solid or hazardous waste may present an imminent and substantial endangerment to health or the environment. . . ."[5/] That the evidentiary test for a § 7003 suit was cast by Congress in these particular terms is significant; so phrased, it limits the relevant events to those occurring at the time suit is brought. Cf. Stafford v. Briggs, U.S. , , 63 L. Ed.2d 1, 9 (1980).[6/] At the St. Louis Park site at the present time, there is no handling, storage, treatment, transportation, or disposal being done by anyone, let alone Reilly Tar. Thus, none of the evidentiary acts necessary to trigger § 7003 is presently occurring.

The court in United States v. Solvents Recovery Service of New England, supra, took the view that the triggering event under § 7003 was a current condition created by a past activity, 496 F. Supp. at 1139-1140, but this view does not comport with the statutory language. The statute does not refer to the mere existence of hazardous waste that is presenting a danger. Instead, the lan-

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5/ While "handling" is not further defined, RCRA § 1004, 42 U.S.C. § 6903, provides definitions of "storage" (RCRA § 1004 (33)), "treatment" (§ 1004(34)), "disposal" (§ 1004(3)), "solid waste" (§ 1004(27)), and "hazardous waste" (§ 1004(5)).

6/ Stafford v. Briggs required the Court to interpret § 2 of the Mandamus and Venue Act of 1962, 28 U.S.C. § 1391(e). The fact that Congress chose to cast that statute in the present tense was a significant factor in the Court's analysis. See 63 L.Ed.2d at 9-10.

guage chosen by Congress refers to an activity, e.g., handling, which may present a danger. The relevant legislative history supports this reading, as will be discussed infra.

The 1980 Amendments demonstrate that when Congress wished to focus on past activity, or to have the relevant occurrence be the mere presence of hazardous waste, it carefully chose the language to do so. New § 3013(a) provides:

> SEC. 3013(a) AUTHORITY OF ADMINISTRATOR.- If the Administrator determines, upon receipt of any information, that--
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> (1) the presence of any hazardous waste at a facility or site at which hazardous waste is, or has been, stored, treated, of disposed of, or
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> (2) the release of any such waste from such facility or site
>
> may present a substantial hazard to human health or the environment, he may issue an order requiring the owner or operator of such facility or site to conduct such monitoring, testing, analysis, and reporting with respect to such facility or site as the Administrator deems reasonable to ascertain the nature and extent of such hazard.

RCRA § 3013(a), 1980 Amendments § 17(a) (emphasis added).

Recognizing the congressional choice of present activity language for § 7003, the United States has alleged that, despite Reilly Tar's complete absence from the St. Louis Park site for years before RCRA was passed, there is nonetheless current activity which constitutes "disposal" by Reilly Tar. See Complaint at ¶¶ 26-29. This interpretation of disposal, however, flies in the face of the language of the statute.

Disposal is defined in Section 1004(3) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6903(3):

> The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

The statutory definition clearly contemplates human agency,[7] thus refuting the theory implicit in the government's complaint that the continued leaking of chemicals beneath the St. Louis Park site somehow constitutes "disposal" within the meaning of the Act. See Complaint at ¶¶ 22, 27, 29.[8] In fact, not even every current act

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7/ Cf. State v. Exxon Corp., 151 N.J. Super. 464, 376 A.2d 1339 (Ch. Div. 1977) (New Jersey statute defining "discharge" as meaning, but "not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, or dumping" connotes "some activity, some human agency, even if that activity is accidental or unintentional," and refers to "action that carries from an agent or subject to an object." Id. at 471-472, 376 A.2d at 1343.

8/ It is important to note the difference between the terms "leaking" and "leaching". The word "leak" generally is not applied to the process by which contaminants spread through a groundwater system. The term used is "leaching." The term "leachate," for example, means any liquid including any suspended components percolated through or drained from hazardous wastes. 40 CFR 260.10(40). Even more precisely, the process by which most contaminants move through groundwater is a process of absorption into, adsorption on and desorption from soil particles, and the movement of suspended or solublized materials in the groundwater itself. In any case, the term "leaking" is neither used to describe the process nor descriptive of the process.

Congress was aware of this definitional difference when it enacted RCRA (see, e.g., RCRA § 1008(a)(2)(B), requiring the promulgation by EPA of guidelines which would describe levels of performance for "protection of the quality of groundwater and surface waters from leachates"), and it is significant that the government has implicitly recognized this distinction in its Complaint. Compare ¶¶ 18 and 22, referring to the continued leaching of chemicals already in the ground, with ¶¶ 16 and 27, referring to acts by Reilly Tar allowing the leaking of chemicals into the ground.

of disposal constitutes "disposal" within the meaning of the Act. Because of the definition's "so that" clause, only disposal practices which may result in materials entering the environment are included in the definition. This "so that" clause, in which consequences of disposal are clearly separated from the acts of disposal and constitute a limitation thereon, is further evidence that the Congressional definition of disposal refers to the activity of disposing and not the results thereof.

The present suit against Reilly Tar also fails another requirement articulated by the terms of § 7003. That section authorizes the Administrator, if the evidentiary tests are satisfied, to sue "any person contributing to such handling, storage, treatment, transportation or disposal." Congressional use of the present tense is not presumed to be accidental. To paraphrase the analysis recently employed by the Supreme Court when faced with a similar problem of statutory interpretation: "The highlighted language, cast by Congress in the present tense, can reasonably be read as describing the character of the defendant at the time of the suit. So read, it limits [an authorized suit under § 7003] to one against a [person] who is at that time acting. . . ." Stafford v. Briggs, supra, 63 L.Ed.2d at 9.

Moreover, such a construction makes sense in the context in which the phrase is used. A person "contributing to the alleged disposal" includes not only a person actually disposing within the meaning of the act, but also anyone "contributing" to that disposal through handling, storage, treatment, or transportation. This intent is reflected in the language allowing the Administrator to

seek to stop "such handling, storage, treatment, [or] transportation." As has been seen, in the present case, Reilly Tar is not engaging in or even contemplating any activities at the site which could be stopped.

The Focus of § 7003 on Present Activities is Consistent with the Perspective of RCRA as a Whole.

The plain meaning of the words employed by Congress in § 7003 thus indicates that a suit such as the instant one is not within the authority to sue conferred by § 7003. This is confirmed by reference to the statute as a whole and to its legislative history.

Looking first at the whole of the Resource Conservation and Recovery Act of 1976, it is clear that the Act is prospective in nature. This is clear not only with respect to provisions relating to research and development, see, e.g., RCRA §§ 8001-8007, 42 U.S.C. §§ 6981 et seq., or to the development of state and regional solid waste plans, see e.g., RCRA §§ 4001-4009, 42 U.S.C. §§ 6941 et seq., but to provisions for regulations as well. See, e.g., RCRA § 3010, 42 U.S.C. § 6930. Indeed, the EPA concedes as much. The following comments issued with respect to the subtitle C regulatory provisions are illustrative:

> The Agency believed that the following statement in the preamble to the proposed Section 3004 regulations stated that Agency's intent generally not to regulate portions of facilities closed before the effective date of the regulations:
>
> RCRA is written in the present tense and its regulatory scheme is organized in a way which seems to contemplate coverage only of those facilities which continue to operate after the effective date of the regulations. The Subpart D standards and Subpart E permitting procedures are not directed at inactive facilities. (43 FR 58964)

> However, the Agency realizes that its original intent would have been more clearly stated if the words "or inactive portions of active facilities" had been added to the above sentence. The Agency's intent is not to regulate under Subtitle C portions of facilities closed before the effective date of the regulations.

45 Fed. Reg. 33068 (1980). Section 7003, however, is also written in the present tense, and by its terms contemplates coverage only of those activities which continue to operate. Absent a clearly indicated congressional intent to the contrary, it should not be given the strained interpretation given to it by EPA for this case. The sole exceptions to the forward-looking nature of RCRA as a whole are the new sections 3012 and 3013, added by § 17(a) of the 1980 Amendments. In this case, however, they are the exceptions which prove the rule; that they are retrospective is clearly spelled out in statutory language, unlike any other RCRA section, including § 7003. Section 3012 directs the states to undertake and submit to EPA an inventory of sites "at which hazardous waste has at any time been stored or disposed of," RCRA § 3012(a), and the language of § 3013(a), quoted supra, is similarly specific in its reference to the past.

Section 3013(b) contains RCRA's sole reference to former owners and operators of inactive sites:

> (b) PREVIOUS OWNERS AND OPERATORS.--In the case of any facility or site not in operation at the time a determination is made under subsection (a) with respect to the facility or site, if the Administrator finds that the owner of such facility or site could not reasonably be expected to have actual knowledge of the presence of hazardous waste at such facility or site and of its potential for release, he may issue an order requiring the most recent previous owner or operator of such facility or site who could reasonably be expected to have such actual knowledge to carry out the actions referred to in subsection (a).

Once again, the reference to the past is clear, reiterating the point that when Congress wished to legislate with regard to past activities or former owners it was explicit in its choice of terms.

The Legislative history of Section 7003 also demonstrates it was not meant to apply to suits against prior owners of inactive sites.

From the language of both § 7003 in particular and RCRA taken as a whole, it is apparent that § 7003 does not authorize a suit such as the instant one against the former owner of a site closed and abandoned long before the passage of RCRA. Given this, "it would take a very clear expression in the legislative history of congressional intent to the contrary to justify the conclusion that the statute does not mean what it so plainly seems to say." Aaron v. SEC, ____ U.S. ____, 64 L. Ed.2d 611, 627 (1980). No such clear contrary expression exists, however, and in fact, such legislative history as exists of § 7003 supports the interpretation derived from the plain meaning of its terms.

The Senate version of the bill which became the Resource Conservation and Recovery Act of 1976 was introduced in the 94th Congress as S.2150, a bill to amend the Solid Waste Disposal Act. S. 2150, 94th Cong., 1st Sess. (1975). The Committee on Public Works offered an amendment to S.2150 in the nature of a substitute, and the imminent hazard provision of this bill provided:

> SEC. 213. Notwithstanding any other provision of this Act, the Administrator upon receipt of evidence that the disposal of any solid waste or hazardous waste is presenting an imminent and substantial endangerment to the health of persons or the environment, may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person causing or contributing to the alleged disposal to stop

such disposal or to take such other action as may be necessary. The Administrator shall provide notice to the affected State of any such suit.

S.3622, 94th Cong., 2d Sess § 213 (1976). In its Report accompanying S.3622, the Committee observed that:

> New section 213 authorizes the Administrator to seek an injunction to halt the disposal of any solid or hazardous wastes if the disposal presents an imminent or substantial danger to personal health or the environment. The suit is to be brought in the appropriate Federal district court, which could immediately restrain any person causing or contributing to the alleged disposal from continuing such disposal or take other action as may be necessary.

S. Rep. No. 94-988, 94th Cong., 2d Sess. 16 (1976) (emphasis added). The bill passed the Senate on June 30, 1976. See 122 Cong. Rec. S.11097 (daily ed. June 30, 1976).

The House, meanwhile, was considering its own version. On September 9, 1976, the House Committee on Interstate and Foreign Commerce reported out H.R. 14496, 94th Cong., 2d Sess. (1976). The imminent hazard provision of this bill provided:

> SEC. 703. Notwithstanding any other provision of this Act, upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any discarded material or hazardous waste is presenting an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person for contributing to the alleged disposal to stop such handling, storage, treatment, transportation, or disposal or to take such other action as may be necessary.

The Report's discussion of this provision was but a paraphrase of the bill's language, except that a key line is missing, apparently due to printing error:

> This section provides that notwithstanding any other provision of this act, upon receipt of evidence that the handling, storage, treatment, [missing language] an imminent and substantial endangerment to health and the environment then

> the Administrator may bring suit in the United States' District Court, for appropriate relief.

H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. 69, reprinted in [1976] U.S. Code Cong. & Ad. News 6238, 6308.

To expedite passage, the House passed the Senate version of the bill on September 27, 1976 after amending that version by incorporating the text of H.R. 14496. 122 Cong. Rec. H. 11182 (daily ed. Sept. 27, 1976). The Senate accepted this change in language, 122 Cong. Rec. S.17256 (daily ed. Sept. 30, 1976), and the bill was signed into law on October 21, 1976.

It is noteworthy that both the Senate version of the imminent hazard provision and the House text which eventually passed were consistently written in the present tense.[9/] Thus, throughout its consideration of the

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9/ The sole significant difference between the proposed Senate version of the bill and that which Congress eventually passed was the deletion of the term "causing" in the phrase "may bring suit . . . to immediately restrain any person causing or contributing to the alleged disposal . . .." Had the legislation passed as originally phrased by the Senate, it would have strengthened the government's argument that § 7003 was intended to reach not only current disposers but those who had caused a disposal to be made in the past. But the "causing" language was dropped from the bill before it passed Congress. While elimination of the term "causing" might not be dispositive standing alone, when coupled with all of the other consistent indications of congressional intent, it is a significant nail in the coffin for the government's strained construction. "The unexplained deletion of a single phrase from a jurisdictional provision is, of course, not determinative . . . But it is one more piece of evidence that Congress did not intend to authorize a cause of action . . . ." Transamerica Mortgage Advisors, Inc. v. Lewis, ___ U.S. ___ 62 L.Ed.2d 146, 156 (1979).

legislation, Congress had in mind a provision which by its terms was aimed at ongoing activity.10/

The last remaining vestige of ambiguity in terms of the present tense application of § 7003 was removed in 1978, when certain "technical amendments" to RCRA were made in a rider attached to the Quiet Communities Act of 1978, Pub.L. No. 95-609, 92 Stat. 3079. As passed in 1976, § 7003 of RCRA contained language authorizing the Administrator to bring suit against "any person for contributing to the alleged disposal . . . " See 90 Stat. 2795, 2826 (emphasis added). Had this language remained, it might have provided some support in the language of the statute for the government's theory that the instant suit against Reilly Tar for past activities is authorized under § 7003. But § 7(q) of the Quiet Communities Act amended § 7003 "by striking out 'for' before 'contributing to the alleged disposal.'" Pub. L. No. 95-609, § 7(q), 92 Stat. 3083 (1978). The legislative history discloses that these 1978 amendments were "developed to correct certain errors in the drafting of the original legislation . . .,"11/ and were "necessary to assure the workability of the

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10/ In the debates preceding passage of the Senate version of the bill, Senator Humphrey--whom the government has elsewhere described as "[t]he only congressman who appears to have commented specifically on 42 U.S.C. § 6973," Plaintiff's Memorandum in Opposition to the Motion to Dismiss at 6, United States v. Solvents Recovery Service of New England, supra--stated that the bill provided for "immediate judicial review of solid or hazardous waste disposal practices which constitute an imminent health hazard." 122 Cong. Rec. S. 11096 (daily ed. June 30, 1976). This indicates his belief that it is ongoing disposal practices, not subsequent effects, which are jurisdictionally relevant. If the practices constitute an imminent health hazard, immediate review of them may be had.

11/ 124 Cong. Rec. S. 18738 (daily ed. Oct. 13, 1978) (remarks of Sen. Culver).

act."[12] They were also stated to be "agreeable to EPA",[13] and, in the case of § 7003, they eliminated all ambiguity from the statutory language.

The legislative history of the 1980 Amendments confirms what is apparent from the language of § 7003--that it does not authorize suits against former owners for past activities. The only change in § 7003 arguably of significance to the issue at hand is the substitution of "may present" for the "is presenting" language of the original. This change was intended to effect the burden of proof borne by the Administrator when bringing a § 7003 suit.

As introduced in the Senate, see S.1156, 96th Cong., 1st Sess (1979), the amendment would have eliminated the term "imminent" from the phrase "evidence that [an activity] is presenting an imminent and substantial endangerment," thus requiring only that a substantial endangerment be present. See S. Rep. No. 96-172, 96th Cong., 1st Sess. 5 (1979). Rather than thus modifying the term of art "imminent and substantial endangerment", the House version, H.R. 3994, 96th Cong., 1st Sess. (1979), provided for the substitution of the phrase "may present" in place of the "is presenting" language, leaving the rest of the test intact. As explained on the floor, this provision

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12/ 124 Cong. Rec. H. 11936 (daily ed. Oct. 10, 1978) (remarks of Rep. Skubitz).

13/ 124 Cong. Rec. H. 11935 (daily ed. Oct. 10, 1978) (remarks of Rep. Rooney).

was to increase EPA's enforcement powers by altering the burden of proof:[14]

> The bill also provides EPA with increased enforcement powers to respond to hazardous waste situations. EPA is given power to seek a court order when it finds that the handling, storage, treatment, transportation, or disposal of hazardous waste may present a substantial danger to public health or the environment. Under present law, the Agency must show that an imminent and substantial hazard already exists.

126 Cong. Rec. H.1111 (daily ed. Feb. 20, 1980) (remarks of Rep. Rinaldo).[15]

The legislative history of new sections 3012 and 3013 also confirms the inapplicability of § 7003 to past activities and former owners. It was conceded that "RCRA contains no reference to or remedy for abandoned or inac-

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[14] The Administrator's enforcement powers were also "enhanced" by the addition of a power to issue emergency orders prior to the initiation of judicial proceedings. As explained by Representative Staggers:

> The so-called "imminent hazard" authority contained in existing law is deficient in that it requires preresponse judicial proceedings. Such litigation may unduly delay emergency action to abate an imminent or existing hazard and it subjects the Administrator to a difficult burden of proof in demonstrating the existence or imminence of a substantial hazard. H.R. 3994 remedies these deficiencies by authorizing the Administrator to issue and enforce emergency orders to protect public health and the environment, prior to lengthy litigation contesting the existence or degree of hazard and by imposing a less restrictive burden of proof in the event such litigation ultimately does ensue.

126 Cong. Rec. H1085 (daily ed. Feb. 20, 1980).

[15] It is also clear, however, that the burden was to remain relatively high. The report of the House Committee on Interstate and Foreign Commerce stated that: "The committee intends that the Administrator use this authority where the risk of serious harm is present." H.R. Rep. No. 96-191, 96th Cong., 1st Sess. 5 (1979). On the floor, it was pointed out that this burden was higher than that stated in § 3013, which also has the "may present an imminent and substantial endangerment" language. See 126 Cong. Rec. H1097 (daily ed. Feb. 20, 1980) (remarks of Rep. Gore).

tive hazardous waste sites." 126 Cong. Rec. H. 1090 (daily ed. Feb. 20, 1980) (remarks of Rep. Gore). See also id. at H.1097 ("the major criticism levied against our hazardous waste law is its prospectiveness. RCRA does not address the issue of abandoned or inactive sites."); H. R. Rep. No. 96-191, supra, at 4. The response to this gap in existing law was the enactment of the state-wide inventory program, § 3012, and the monitoring requirements of § 3013:

> This measure is a direct result of concerns expressed during reauthorization hearings. There is agreement that some preliminary measures are needed to immediately address the abandoned sites issue. Some determination of the scope of the problem is required before a new or expanded program can be launched. This provision should be viewed as an initial step toward addressing the abandoned sites problem, and not as a solution.

H. R. Rep. No. 96-191, supra, at 4. The limited nature of this program was reemphasized on the floor by its author:

> . . . this legislation that we have before us, while it is excellent, does not address the entire problem, and we will be asked later this year to address other legislation which would address the problem of abandoned sites. This legislation, which has been described as the superfund legislation, will be coming before this body later this year, and there will be a more heated debate at the time.
>
> * * *
>
> The amendment is a modest one: it authorizes testing and monitoring. Cleanup actions and liability provisions are not authorized under my amendment.

126 Cong. Rec. H.1097 (daily ed. Feb. 20, 1979) (remarks of Rep. Gore).

Immediately prior to final House passage of the bill after the meeting of House and Senate conferees, the House sponsor was asked if there were any aspects of the "superfund" legislation in the bill:

> Mr. ROUSSELOT. . . . We heard some rumblings that the Senate intended to put aspects of the superfund in here. Was that attempt made, or did the gentlemen resist it or whatever?
>
> Mr. FLORIO. If the gentlemen will yield, there was no such attempt made. The only thing that is comparable to the superfund legislation was a provision to provide for inventorying of hazardous wastes, but it does not go to the substance of the superfund proposal.
>
> Mr. ROUSSELOT. So the gentlemen can assure us that there is nothing in here?
>
> Mr. FLORIO. I can assure the gentlemen that there are no superfund provisions in this.

126 Cong. Rec. H10333 (daily ed. Oct. 2, 1980).16/

From the foregoing, it is apparent that the only provisions of RCRA which apply to past activities or former owners are the newly-added, limited provisions of §§ 3012 and 3013. Section 7003 was not originally intended to apply to past activities or owners, and the 1980 Amendments do not alter this.17/

16/ A scaled-down version of the "superfund" legislation referred to above was enacted into law on December 11, 1980 as the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," Pub. L. No. 96-510. By its explicit terms, however, that Act does not apply to or affect a suit such as the instant one brought pursuant to the provisions of RCRA § 7003:

> Nothing in this Act shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants.

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, § 302(d) (December 11, 1980).

17/ New RCRA § 3012(d), which states:

> Nothing in this section shall be construed to provide that the Administrator or any State should, pending completion of the inventory required under this section postpone undertaking any enforcement or remedial action with respect to any site at which hazardous waste has been treated, stored, or disposed of

One statement in the House Committee Report expresses the sentiment that "[t]he Administrator's authority under section 7003 to act in situations presenting an imminent hazard should be used for abandoned sites as well as active ones." H.R. Rep. No. 79-191, supra, at 5. But this statement is not an explanation of the intended effect of the 1980 Amendments; it is at most the response of one committee to the fact that EPA had announced an intention "to expand its enforcement program." H.R. Rep. No. 96-191, supra, at 4. As such, the committee's statement is not part of the true legislative history of § 7003 and is not dispositive as to Congressional intent. SEC v. Sloan, 436 U.S. 103 (1978).

In Sloan, the Court was asked to interpret the scope of an authority to act in the public interest to suspend trading in a security, which authority was conferred on the SEC by certain provisions of the Securities Exchange Act of 1934. See id. at 105. The SEC argued that Congress should be considered to have approved the SEC's broad construction of the statute because Congress had re-enacted the relevant provision without disapproving the SEC construction, the SEC had made its views known to Congress in committee hearings, and at least one committee had indicated through its report that it understood and approved of the SEC's practice. See id. at 119-120.

The Supreme Court rejected the SEC's arguments. It pointed out that the administrators had not made their

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17/ (Continued)
does not itself define or authorize any enforcement or remedial action. One must look elsewhere to determine what enforcement or remedial actions may be brought by the EPA or the states.

views on interpretation known before the relevant Congress--the one which had originally drafted the legislation in 1934. Id. at 120. The purpose of the subsequent legislation enacted after the SEC's construction was made known was only indirectly related to the scope of the SEC's authority. Id. at 120-121 & n.11. And there was no indication of widespread congressional approval, absent which the Court was "extremely hesitant" to find in the committee statement dispositive authorization for "a construction of the statute which not only is at odds with the language of the section in question and the pattern of the statute taken as a whole, but also is extremely far reaching in terms of the virtually untrammeled and unreviewable power it would vest in a regulatory agency." Id. at 121.

The parallel to the instant case is apparent. Here, the EPA's expansive interpretation of § 7003 authority was not put before the Congress which in 1976 enacted RCRA. The relevant 1980 Amendments to § 7003 dealt with the amount and type of proof required (and with the authority to issue orders instead of only going to court) rather than with the retroactive reach of § 7003. Indeed, Congress did not even arguably "re-enact" § 7003 with a newly attached legislative meaning; it merely made a few changes unrelated to the question of retroactivity vel non. And, rather than a mere absence of congressional agreement with a retrospective construction of RCRA, as has been discussed above there were several statements to the contrary.

The relevant legislative history thus supports the plain, present tense meaning of § 7003. Indeed, even

if it were thought ambiguous, it would not support the expansive interpretation on which the government's complaint is based. At the least, it "may be read in a manner entirely consistent with the plain meaning of [§ 7003]," and, "[i]n the absence of a conflict between reasonably plain meaning and legislative history, the words of the statute must prevail." Aaron v. SEC, supra, 64 L.Ed.2d at 628.

The view of the court in United States v. Solvents Recovery Service of New England, supra, that § 7003 applied to past acts of disposal was based primarily on the remdial aspects of the legislation and on post-passage legislative "history." See, e.g., 496 F. Supp. at 1139-1141. The general remedial aspects of RCRA are both laudable and undeniable, but "generalized references to the remedial purposes of the . . . law[] will not justify reading a provision more broadly than its language and statutory scheme reasonably permit." Aaron v. SEC, supra, 64 L.Ed.2d at 625 (internal quote omitted). As has been discussed above, the language of the provision in question, the context of the statute as a whole, and the relevant legislative history all consistently support the interpretation of § 7003 derived from the plain meaning of its terms--that the Administrator is authorized to bring suit against any person whose present activities with hazardous waste may present an environmental emergency. "Thus, if the language of a provision of the . . . law[] is sufficiently clear in its context and not at odds with the legislative history, it is unnecessary 'to examine the additional considerations of "policy" . . . that may have influenced the lawmakers in their formulation of the stat-

ute.'" Aaron v. SEC, supra, 64 L.Ed.2d at 625, quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 n.33 (1976).

The Solvents Recovery court also made reference to a 1979 oversight report which stated:

> As the previous description reveals, RCRA is basically a prospective act designed to prevent improper disposal of hazardous wastes in the future. The only tool that it has to remedy the effects of past disposal practices which were not sound is its imminent hazard authority. . . .
>
> * * *
>
> Imminence in this section applies to the nature of the threat rather than identification of the time when the endangerment initially arose. The section, therefore, may be used for events which took place at some time in the past but which continue to present a threat to the public health or the environment.

Report on Hazardous Waste Disposal, Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 96th Cong. 1st Sess. 32 (Comm. Print 1979). But as the Solvents Recovery court itself observed, "a subsequent report is not part of the legislative history of RCRA and therefore lacks the probative value as to legislative intent that contemporaneous statements of Congress' purpose would have." 496 F. Supp. at 1140 n.18. Moreover, the post factum reasoning in the Report is inherently faulty. The Report states that, because "Imminence . . . applies to the nature of the threat . . ., therefore" § 7003 authorizes suit against past disposers. This reading ignores the present tense meaning of the section discussed at length above. Of course imminence applies to the nature of threat, which under the statute must be imminent before it is actionable, but the statute by its terms requires an ongoing act of "handling, storage, treatment, transportation, or disposal" to be presenting that threat before suit is author-

ized. Environmental danger in itself is not enough; there must be a current activity presenting that danger before suit is authorized under § 7003.18/

The lack of a clear legislative statement that § 7003 was to have a retrospective application is a very conspicuous absence, for a statute operates prospectively only, unless a contrary intention appears. Brewster v. Gage, 280 U.S. 327, 337 (1930).

> [T]he first rule of construction is that legislation must be considered as addressed to the future, not the past. The rule is one of obvious justice, and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed. . . . [A] retrospective operation will not be given to a statute . . . unless such be the unequivocal and inflexible import of the terms and manifest intention of the legislature.

Union Pacific R.R. Co. v. Laramie Stockyards Co., 231 U.S. 190, 199 (1913). See also Appalachian Power Co. v. Train, 620 F.2d 1040, 1047 (4th Cir. 1980).

The court in United States v. Solvents Recovery Service of New England, supra, attempted to sidestep this rule and RCRA's clear lack of a retrospective intent by stating that the rule did not apply here. 496 F. Supp. at 1141. The court correctly observed, id., that a retroactive statute is one which "creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." Sturges v. Carter, 114 U.S. 511, 519 (1885), quoting

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18/ The addition of new §§ 3012 and 3013 make the distinction between mere presence of waste and ongoing activity clear. Only the presence of waste which may present a danger is necessary to trigger the inventory and monitoring provisions of 3012 and 3013, but § 7003 requires an ongoing practice which may present an emergency before suit may be brought or emergency orders issued to halt it.

Society for Propagation of the Gospel v. Wheeler, 22 Fed. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156) (Story, J.). But the court then erroneously concluded that § 7003 was not such a statute because any liabilities imposed thereunder are created by federal common law rather than RCRA, and these liabilities would be the same as were present under state nuisance law when the pre-RCRA acts of the defendants took place. 496 F. Supp. at 1141-1142.

If the Solvents Recovery court is correct, however, in its conclusion that RCRA § 7003 creates a new federal common law of groundwater pollution that does not require interstate effects, see 496 F. Supp. at 1135-1139, then it is wrong in saying no new liabilities are created by § 7003. For even if the obligations or duties involved under this new federal law are found to be the same as under pre-existing state law,[19] that they are now, after RCRA, owed to the federal government as well as the state is unquestionably a new and separate liability. Absent "the unequivocal and inflexible import of the terms and manifest intention of the legislature" that this new liability be applied retroactively, it cannot be so applied.[20]

19/ If the new federal law is in fact no different than state law, there would seem to be no reason to create it. See the discussion of the federal common law of nuisance, infra.

20/ In a case such as this, the retroactivity question may well be of constitutional dimensions. Although the Due Process Clause generally does not prohibit retrospective civil legislation, it does come into play if the consequences are particularly harsh and oppressive, U.S. Trust Company of New York v. New Jersey, 431 U.S. 1, 17, n.13 (1977); Matter of U.S. Financial, Inc., 594 F.2d 1275, 1281 (9th Cir. 1979), as the relief requested by the government against Reilly Tar in this situation clearly is. Avoidance of this constitutional question is but another reason against

Even the contemporaneous agency interpretation of § 7003 was that it did not reach former owners of abandoned sites.

Although not as probative as true legislative history, contemporaneous interpretations of a statute by an agency charged with its enforcement are at least as useful as post-passage statements of congressional committees. See Andrus v. Shell Oil Co., ___ U.S. ___, 100 S. Ct. 1932, 1939 (1980). Statements made in the 1978 oversight committee hearings show that, at the least, EPA had serious doubts about the applicability of § 7003 to past disposal situations and did not believe it could be applied against former owners of abandoned sites. In testimony before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, the manager of the EPA's Hazardous Waste Management Division's Assessment Program stated that the remedy available to EPA under § 7003 was a cease and desist order. Oversight--Resource Conservation and Recovery Act: Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 95th Cong., 2d Sess. 336 (1978) ("1978 Hearing") (statement of Hugh B. Kaufman). He went on to describe the type of situations where § 7003 action would be appropriate:

> [W]e like to think of four different types of sites.

20/ (Continued)
following an interpretation of § 7003 that would authorize the present suit where "the affirmative intention of the Congress clearly expressed" is lacking. Cf. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979).

> First, an abandoned site, where the site is currently owned by someone who is in no way involved, such as the Love Canal situation.
>
> The second type of site is an abandoned site that is not being used anymore but is on the property of a party who was involved with the disposal.
>
> The third type of site is an existing site, but a bad site, that probably could never come up to our standards.
>
> The fourth type of site is a good existing site that could meet our standards.
>
> The imminent hazard provisions certainly could be used for the last three. The Love Canal type situation, where it is very difficult to go after a party, might not be appropriate, but certainly the other three types of sites, imminent hazard authority could be used.

1978 Hearing at 337.

Other agency statements also reflect the view that § 7003 does not reach former owners of abandoned sites. For example, in an April 20, 1978 EPA memo to the Director of the Hazardous Waste Management Division, the manager of the Assessment Program urged the initiation of a major program to use § 7003 to require the "clean up" of hazardous waste facilities in the United States. He was careful to explain, however, the type of facility against which action under § 7003 could be taken:

> It appears that hazardous waste facilities are aware that EPA will not be able to thoroughly scrutinize facilities and compliance with our standards for a few more years. Companies who have assessed their facilities and concluded that they could not get an EPA permit to operate once our strong enforcement begins, have a positive incentive to take as much waste as possible and provide only minimum care until such time as RCRA Subtitle C is fully implemented. At which point they can close or abandon the facility with virtually no penalty.

Memo from Hugh B. Kaufman to John P. Lehman (April 20, 1978), reprinted in 1978 Hearing at 308-309 (emphasis added).

The testimony of Thomas C. Jorling, EPA's Office of Water and Waste Management Assistant Administrator, gives the same interpretation. In his prepared statement, Mr. Jorling stated that:

> RCRA is not well suited to remedying the effects of past disposal practices which were unsound. We believe that Section 7003 authorizes us to take enforcement action against the owner of an inactive site if the site is presenting an imminent and substantial danger to human health or the environment. Hence, we can effectively exercise this authority where the present owner is in some way responsible for the imminent hazard and is financially and otherwise able to remedy it. However, where these two circumstances are not present 7003 is not an effective tool.

1978 Hearing at 422. Steffen W. Plehn, EPA's Deputy Assistant Administrator for Solid Waste, restated the same position in response to a question as to whether the imminent hazard authority ran to abandoned sites:

> Mr. Chairman, just to put that bluntly, if by abandoned sites you mean really abandoned, meaning that there is neither an owner that is closely associated with the site or even more particularly if there is an owner, but he does not have resources sufficient to deal with the problem, then there is no remedy through the imminent hazard authority, because all it allows us to do is to go to a court and say we think there is an imminent hazard and we think the court should order the owner to clean it up.
>
> If he is not there or he doesn't have any money, that is not a useful tool.

1978 Hearing at 452. Mr. Jorling then further explained the reach of authority under § 7003:

> Let's use as sort of extremes the question of the Love Canal. Here you had an activity that ceased in something like 1956. Property was conveyed to a public ownership. And then the problem was identified--everyone was made aware of it. OK. That is one type of situation.
>
> Another type is the situation in Tennessee, where you had a site receiving these chemicals, which will be included in our list, these wastes. Then the practices of disposal ceased in 1972, but the property continues under the ownership and management of the corporation responsible for the waste.

> And then further along the spectrum, out on the other end is the company which is in the business of receiving hazardous wastes.
>
> We are attempting to draw on that spectrum a line that makes good common sense.
>
> It could include, when we finally act, the [Tennessee] Velsicol situation.

1978 Hearing at 453.

That these views were not merely the on-the-spot reaction of isolated officials under questioning is shown by the November 21, 1978 statement of the Administrator of EPA, Douglas M. Costle, issued to accompany a press release which constituted EPA's response to a request for further information made during the 1978 oversight hearing.[21/] The Administrator stated that "EPA's authority to clean up inactive sites is quite limited. We can take enforcement action against the owner of an inactive site to require cleanup if the site is an imminent and substantial danger to human health or the environment. . . . Many states have more authority than the Federal government to deal with these problems." Statement by EPA Administrator Douglas M. Costle, November 21, 1978, reprinted in 1978 Hearing at 468 (emphasis added). The EPA's press release then provided the following "Q's & A's on Hazardous Waste Information":

> Question: What authority does EPA have to deal with abandoned sites?
>
> RCRA is not well suited to remedying the effects of past disposal practices which were unsound. EPA believes that Section 7003 authorizes enforcement action against the owner of an inactive site if the site is presently an imminent and substantial danger to human health or the environment, but there may be practical problems where the present owner of the site lacks suffi-

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21/ See Letter from Hon. Albert Gore, Jr. to Hon. Douglas M. Costle (Nov. 21, 1978), reprinted in 1978 Hearing at 481.

cient resources to carry out the cleanup or other necessary steps.

EPA Press Release of Nov. 21, 1978, reprinted in 1978 Hearing at 477, 479.

These contemporaneous interpretive statements by EPA demonstrate that the agency charged with the enforcement of RCRA and § 7003 did not believe that it provided authority to reach a situation such as that involved in the instant suit against Reilly tar.22/ Thus, even the contemporaneous agency interpretation is at least to this extent consistent with the plain meaning and relevant legislative history of § 7003.23/

From the plain meaning of the statute, the relevant legislative history, and the contemporaneous agency interpretation, it is clear that § 7003 does not authorize the government to bring a suit such as the instant one against the former owner of an abandoned site where no current activity may present an imminent and substantial endangerment. But even if such a suit were in

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22/ At most, they appear to reflect a view that the current owner of a site may be contributing to a disposal presenting an imminent and substantial endangerment by failing voluntarily to take action. While even this interpretation impermissibly strains the plain meaning of the statute, it is significant to note that, even under this broadest contemporary interpretation by EPA, Reilly Tar would not be included.

23/ The more recent positions taken by EPA on the scope of § 7003 are to be viewed with some suspicion. In February of 1979, EPA and the Justice Department announced that the first cases under § 7003 were being prepared, and in April of that year, EPA announced an intention to accelerate its prosecution program. See Environmental Reporter, Current Developments, p. 1909 (February 9, 1979) & p. 3 (May 4, 1979). Having embarked on a program of § 7003 prosecutions, it appears that EPA decided to attempt to build a record for an authority to sue under § 7003 construed as broadly as possible despite the plain meaning of the statutory language.

general authorized under § 7003,[24/] the instant suit against Reilly Tar would yet fail, for there is no allegation of an interstate effect of the alleged pollution.

The law in the Eighth Circuit is clear: There is no federal common law of nuisance absent an interstate effect.

As the courts in United States v. Solvents Recovery Service of New England, supra, and United States v. Midwest Solvent Recovery, Inc., supra, have held--and as has been discussed above--§ 7003 is merely jurisdictional in nature; its tests determine whether or not suit may be brought and do not prescribe substantive liability. If the jurisdictional tests of § 7003 have been met, a court must look to the federal common law of nuisance for the applicable standards of liability. In the Eighth Circuit, the controlling rule is that there must be interstate pollution of air or water before the federal common law of nuisance may be relied upon as a basis for relief. Reserve Mining Co. v. EPA, 514 F.2d 492, 520 (8th Cir. 1975) (en banc).

In Reserve Mining, the United States brought suit alleging that the defendant's discharge of wastes from its iron ore processing plant into the ambient air of Silver Bay, Minnesota and the water of Lake Superior violated, inter alia, the federal common law of nuisance. Id. at 499, 501. The District Court found that such violations had occurred, but the Court of Appeals for the Eighth Cir-

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24/ Note that neither United States v. Midwest Solvent Recovery, Inc., supra, United States v. Vertac Corp., supra, nor United States v. Solvents Recovery Service of New England, supra, involved a suit brought solely, for all practical purposes, against the former owner of a site abandoned before the passage of RCRA.

cuit held otherwise. In an unanimous en banc opinion, the court held that "federal nuisance law contemplates, at a minimum, interstate pollution of air or water." Id. at 520. Observing that the United States had failed to allege such effects, and finding no evidence of any interstate health hazard, the court rejected the federal common law of nuisance as a basis for relief. Id. at 520-521.25/

As noted by the Reserve Mining court, 514 F.2d at 520, the federal common law of nuisance was "formulated" in the case of Illinois v. City of Milwaukee, 406 U.S. 91 (1972). Illinois involved a suit by Illinois against four Wisconsin cities and other governmental entities for pollution of Lake Michigan. The question was "whether pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of § 1331(a)." 406 U.S. at 99 (emphasis added). The Court ruled that, "When we deal with air and water in

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25/ Because relief as to the water pollution claim was available under the provisions of the Federal Water Pollution Control Act and the Refuse Act (neither of which are alleged as a basis of the government's claim against Reilly Tar), the Eighth Circuit did not expressly rule on the federal nuisance law aspect of the water claim. 514 F.2d at 532. Its statement that, "at a minimum, interstate pollution of air or water" is required for a federal nuisance claim, however, was unequivocal. Id. at 520 (emphasis added). Cf. Reserve Mining Co. v. Lord, 529 F.2d 181, 184 (8th Cir. 1976) (en banc) (among the factors requiring continued supervision by the United States of the water supply of certain communities drawing water from Lake Superior are (1) that Lake Superior is a body of water under federal jurisdiction, and (2) that the pollution affects several states and the health of their inhabitants). See also Omaha Indian Tribe v. Wilson, 575 F.2d 620, 628 (8th Cir. 1978), vacated on other grounds, 442 U.S. 653 (1979) ("Federal common law is applicable even where only a single state is involved in a controversy with a private party . . . as long as the interests of more than one state are sufficiently implicated in the potential outcome.")

their ambient or interstate aspects, there is federal common law." Id. at 103.26/

In Committee for Jones Falls Sewage System v. Train, 539 F.2d 1006 (4th Cir. 1976) (en banc), a group of private citizens sought to enjoin under federal common law the pollution of a navigable stream. The court observed that the controversy was entirely local in character, no interstate pollution was alleged nor any complained of by other states, and state law was "perfectly adequate" for the resolution of the dispute. Id. at 1009. Thus, there was present "neither the reason nor the necessity for the invocation of a body of federal common law," id., and the court held that there was no federal common law to which the plaintiffs could resort, citing Reserve Mining in support of its decision. Id. at 1010.

The court in Parsell v. Shell Oil Co., 421 F. Supp. 1275 (D. Conn. 1976), aff'd mem. 573 F.2d 1289 (2d Cir. 1977), reached a similar result. This case involved an action brought by a private party to recover damages

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26/ The Supreme Court declined to exercise its original jurisdiction in Illinois v. Milwaukee and remitted the parties to federal district court. 406 U.S. at 108. The case has since proceeded through trial and appeal and is presently again before the Supreme Court on writ of certiorari. 444 U.S. 961 (1980). One of the Questions Presented is whether the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act of 1977 have preempted the federal common law of nuisance. See 48 U.S.L.W. 3279 (Oct. 23, 1979).

Note also that in another case currently before the Court, Middlesex County Sewage Authority v. National Sea Clammers Ass'n., No. 79-1711, cert. granted, 49 U.S.L.W. 3289 (U.S. Oct. 20, 1980), one of the Questions Presented is whether a private citizen's claim for pollution of ocean waters based on the federal common law of nuisance is preempted by the regulatory scheme of the Federal Water Pollution Control Act, the Marine Protection Research and Sanctuaries Act, and administrative regulations.

arising out of an oil spill which occurred in the navigable water of a harbor. The court noted that, although the spill had occurred on navigable waters, no interstate effect was alleged, id. at 1281, and held that, without an effect on interstate interests, the federal common law of water pollution does not afford a basis for invoking federal jurisdiction. Id. at 1282.

Ancarrow v. City of Richmond, 600 F.2d 443 (4th Cir.), cert. denied, 444 U.S. 992 (1979), involved a claim for damages based on an allegation that a city sewage plant had polluted the James River and affected the value of plaintiffs' property. One asserted basis of federal jurisdiction was the federal common law of nuisance. Quoting from its decision in Jones Falls, 539 F.2d at 1010, the Fourth Circuit held: "No federal common law action will lie 'where the controversy is strictly local, where there is no claim of vindication of the rights of another state and where there is no allegation of any interstate effect' attending the pollution." 600 F.2d at 445.27/

27/ Although certain cases appear not to regard as controlling the presence or absence of interstate effects, see Illinois v. Outboard Marine Corp., 619 F.2d 623, 630 (7th Cir. 1980), petition for cert. filed, 49 U.S.L.W. 3043 (U.S. July 28, 1980); National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222 (3d Cir.), cert. granted sub nom. Middlesex County Sewage Authority v. National Sea Clammers Ass'n, 49 U.S.L.W. 3289 (U.S. Oct. 20, 1980); In re Oswego Barge Corp., 439 F. Supp. 312, 322 (N.D.N.Y. 1977) (denying cross-motion to dismiss federal common law claim for pollution of navigable waterway affecting only one state); United States ex rel. Scott v. United States Steel Corp., 356 F. Supp. 556 (N.D. Ill. 1973) (denying motion to dismiss claim for federal common law nuisance for pollution of Lake Michigan); United States v. Ira S. Bushey & Sons, Inc., 346 F. Supp. 145 (D. Vt. 1972) (Oakes, J.) (denying motion to dismiss claim under federal common law of nuisance for pollution of Lake Champlain and Burlington Harbor);

The instant case falls well within the reasoning of this line of cases. No interstate effects of the supposed pollution have been alleged nor has any other state complained. There is no allegation that navigable waters are involved. The controversy is strictly local, and the United States has made no allegation that state law is inadequate to deal with the situation. In such a case, there simply is no federal common law of nuisance to invoke.

Despite the authorities cited above, the court in United States v. Solvents Recovery Service of New England, supra, took the view that a claim under the federal common law of nuisance could be stated without an allegation of interstate effect. By a leap of circular reasoning, the court stated that because this case did not involve pollu-

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27/ (Continued)
Id., 363 F. Supp. 110, 120-21 (D. Vt.) (order for injunctive relief, partly on the basis of federal common law, in same case), aff'd without opinion, 487 F.2d 1393 (2d Cir. 1973), cert. denied, 417 U.S. 976 (1974); cf. Stream Pollution Control Board v. United States Steel Corp., 512 F.2d 1036, 1040 (7th Cir. 1975) (Stevens, J.), all involved the alleged pollution of interstate and/or navigable waters. This important fact distinquishes these cases from the instant one, for while there may be "an overriding federal interest in preserving, free of pollution, our interstate and navigable waters," Illinois v. Outboard Marine Corp., supra, 619 F.2d at 630, neither interstate nor navigable waters have been alleged to be involved here.

Note that in the National Sea Clammers Ass'n case, one of the Questions Presented to the Court is whether private parties may assert claims based on the federal common law of nuisance. See 49 U.S.L.W. 3289 (U.S. Oct. 20, 1980). Although this case involves the alleged pollution of the Atlantic Ocean and its tributaries, see 616 F.2d at 1224, which the Third Circuit characterized as "interstate ambient water," 616 F.2d at 1233, it is at least possible that the Court's opinion may shed some light on the reach of the federal common law of nuisance and hence on the issue at hand.

tion of the ambient air or of interstate or navigable waters, cases which did were not controlling. See 496 F. Supp. at 1135. The court thus felt free to refer to Illinois v. City of Milwaukee unencumbered by precedent, and from there to fashion its own branch of federal common law.

The defect in the court's reasoning, however, is a failure to realize that lack of interstate or navigable waters makes the rule of interstate effect more controlling, if anything. If, in cases such as Reserve Mining, Jones Falls, and the others cited above, an interstate effect was held to be a requirement even though ambient air or navigable waters were involved, then a fortiori it is a requirement when such items which arguably could independently support a federal interest are absent. Indeed, in those cases where lack of an alleged interstate effect did not sway the court, it was the presence of such factors as interstate waters (apparently regardless of whether the pollution effects were allegedly felt in another state) or navigable waters which served to provide the federal dimension to the case. See note 27, supra. This is at most what the Court meant in Illinois v. Milwaukee when it stated, in a footnote on which the Solvents Recovery court heavily relied,[28] that:

> Rights in interstate streams, like questions of boundaries, "have been recognized as presenting federal questions."
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> Thus, it is not only the character of the parties that requires us to apply federal law. . . . As Mr. Justice Harlan indicated for the Court in Banco Nacional de Cuba v. Sabbatino, 376 U.S.

28/ See United States v. Solvents Recovery Service of New England, supra, 496 F. Supp. at 1135.

> 398, 421-427, where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law. . . . Certainly these same demands for applying federal law are present in the pollution of a body of water such as Lake Michigan bounded, as it is, by four States.

406 U.S. at 105 & n.6 (citations omitted). For the Illinois Court, it was not only the character of the parties (one state suing the legal entities of another) which required application of federal law, but the subject matter of the dispute: "the pollution of a body of water such as Lake Michigan bounded, as it is, by four States." Assuming arguendo that this means an actual interstate effect may not be required in cases involving pollution of interstate or navigable water, it is certainly not authority for the proposition that there need be no interstate effect where those federal concerns are not present. At least when no pollution of ambient air or interstate or navigable water has been alleged, without an interstate effect, there are no "uniquely federal interests" requiring the protection of "federal judical law," see Banco Nacional de Cuba Y. Sabbatino, 376 U.S. 398, 426 (1964), and neither reason nor necessity mandate the formulation of federal common law to deal with a strictly local problem. See Committee for Jones Falls Sewage System v. Train, supra, 539 F.2d at 1009.

The Solvents Recovery court sought authority for its whole cloth creation of federal common law in the remedial nature of RCRA as a whole. See 496 F. Supp. at 1135-1139. As has been discussed above, however, the general remedial purposes of a statute do not justify the creation of laws beyond a carefully constructed legislative scheme. Cf. Aaron v. SEC, supra, 64 L.Ed.2d at

625. In its decision "to enter an area which has traditionally been considered the sphere of local responsibility," H.R. Rep. No. 94-1491, supra at 3, [1976] U.S. Code & Ad. News at 6240, Congress carefully planned its regulatory scheme to operate prospectively only, see, e.g., RCRA § 3004(b), 42 U.S.C. § 6930(b), and in practical effect to override state control only when state law was inadequate.29/ There is no indication that local situations were to be affected beyond the prospective scheme of permits and plans which Congress devised, except within the narrowly circumscribed monitoring authority of new § 3013.30/

29/ See, e.g., RCRA § 3006, 42 U.S.C. § 6926, which provides for state hazardous waste programs to operate in lieu of the Federal program. Such programs are to be authorized unless the EPA, after notice and hearing, finds them inadequate. Thus, any federal interest in uniformity exists only to the extent of improving inadequate state laws. In the instant case, of course, no allegation has been made that state law is inadequate to deal with the problem at hand.

30/ The Solvents Recovery court relied on the House Report's reference to "dozens of incidents of interstate injury," 496 F. Supp. at 1138, but the location of this reference is significant. The House Committee's reference to several incidents of apparently intrastate pollution occurred within its discussion of the prospective application of permits and guidelines. See H.R. Rep. No. 94-1491, supra, at 17-23, 37-38, [1976] U.S. Code Cong. & Ad. News at 6254-6251, 6274-6276. In other words, the limited congressional response to these incidents was the enactment of a prospective program of permits and guidelines.

The Solvents Recovery court also found interpretive significance in the final sentence of § 7003, which states that: "The Administrator shall provide notice to the affected State of any such suit." The court reasoned that this was an indication that the federal common law of nuisance was to be free of an "interstate effects" requirement. See 496 F. Supp. at 1138-1139. There is no legislative history, however, which supports this. Rather, it appears that this phrase was added to § 7003 so that it would parallel the notice requirement of RCRA § 3008(a)(2), 42 U.S.C. § 6928(a)(2), which requires the Administrator to notify a state which is authorized to implement its

As the court stated in United States v. Midwest Solvent Recovery Inc., supra, 484 F. Supp. at 144: "The Act elsewhere establishes by regulations the standards of conduct that must be followed by those who generate, transport, or own or operate facilities that treat, store or dispose of hazardous wastes. 42 U.S.C. §§ 6922, 6923, and 6924. . . . Any provision that could logically be read so to expand the set of persons liable under the federal solid and hazardous waste regulatory scheme would surely be identified as such in the legislative history." But Congress did not indicated an intent to reach into local matters in any way other than its prospective RCRA scheme. "To the extent there is a federal interest, it is

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30/ (Continued)
own program in lieu of the federal one before commencing suit for a violation of the regulatory provisions of RCRA. The House Report contains the following comments regarding notification:

> Further, the Administrator, after giving the appropriate notice to a state that is authorized to implement the state hazardous waste program, that violations of this Act are occurring and the state failing to take action against such violations, is authorized to take appropriate action against those persons in such state not in compliance with the hazardous waste title.
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> Therefore, a state retains the primary authority to implement its hazardous waste program so long as such program remains equivalent to the federal minimum standards. If the state program does not remain equivalent to the federal minimum standards then the Administrator is authorized to implement the hazardous waste provisions of this Act in such state.

H.R. Rep. No. 94-1491, supra at 32, [1976] U.S. Code Cong. & Ad. News at 6270. Thus, the "affected State" language of § 7003, rather than referring to the effects of the pollution, would appear to refer to the location of the alleged polluter. So read, especially in light of the above legislative history, it is another indication that Congress did not intend a federal involvement except in situations where state law or enforcement thereof was inadequate. As has been noted, there is no such allegation of inadequacy here.

expressed in the regulatory scheme of the statute . . . . While the state courts are free to apply state nuisance law more rigidly, a federal court in such a local controversy may not turn to a supposed body of federal common law to impose stricter standards than the statute provides." Committee for Jones Falls Sewage System v. Train, supra, 539 F.2d at 1009 (footnote omitted) (emphasis added).31/

Section 7003 is Limited to Imminent and Substantial Hazards.

In addition to the statutory prerequisite of present activity and the federal common law requirement of an interstate effect, another evidentiary test which must be passed before suit is authorized under § 7003 is the

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31/ In the footnote, the Jones Falls court observed that Congress had recognized the continuing validity of state common law nuisance actions in subsection 1365(e) of the Federal Water Pollution Control Act Amendments of 1972. 539 F.2d at 1009 n.9. Similarly, Congress recognized the continuing validity of such actions in RCRA § 7002(f).

The Senate Committee Report accompanying its version of the 1980 RCRA Amendments supports the conclusion that the federal common law of nuisance reaches only pollution of an interstate nature. The Report states:

> Like other imminent and substantial endangerment provisions in environment statutes, (e.g., section 504 of the Clean Water Act, section 303 of the Clean Air Act, and section 1431 of the Safe Drinking Water Act), section 7003 is essentially a codification of common law public nuisance remedies. The Congress made this intent clear as early as 1918 when, in section 2(d) of the Water Pollution Control Act (the forerunner of present-day imminent hazard provisions), it expressly declared that "(t)he pollution of interstate waters . . . which endangers the health or welfare of persons . . . is hereby declared to be a public nuisance and subject to abatement as herein provided" . . .

S. Rep. No. 96-172, 96th Cong., 1st Sess. 5 (1979).

requirement that a current activity involving a hazardous waste may present "an imminent and substantial endangerment to health or the environment." Even if the plain meaning of the statutory language is strained so that the activity test is deemed met, the situation at the St. Louis Park site does not constitute a threatened imminent and substantial endangerment.

The phrase "imminent and substantial endangerment" is not defined in the Act itself. The courts which have construed its meaning in § 7003 have to date focused primarily on the truism that an "imminent endangerment" is not a harm which has already occurred. Thus the court in United States v. Vertac Chemical Corp., 489 F. Supp. 870 (E.D. Ark. 1980), looked to the opinion of the Eighth Circuit in Reserve Mining Co. v. EPA, 514 F.2d 492, 529 (8th Cir. 1975) (en banc) and its quotation from Judge Wright's dissent from the panel opinion in Ethyl Corporation v. EPA, No. 73-2205 (D.C. Cir., Jan. 28, 1975):

> Case law and dictionary definition agree that endanger means something less than actual harm. When one is endangered, harm is threatened; no actual injury need ever occur.
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> Endanger," * * * is not a standard prone to factual proof alone. Danger is a risk, and so must be decided by assessment of risk.
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> * * *
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> [A risk may be assessed] from suspected, but not completely sustained, relationships between facts, from trends among facts, from theoretical projections from imperfect data, or from probative preliminary data not yet certifiable as "fact."

See United States v. Vertac Chemical Corp., supra, 489 F. Supp. at 884-885.

In that part of its Reserve Mining opinion referred to by the district court in Vertac, however, the Eighth Circuit was construing the term "endangering" as found in the terms of §§ 1160(c)(5) and (g)(1) of the Federal Water Pollution Control Act. 514 F.2d at 528-529. The court carefully distinquished the narrower standard contained in the 1972 amendments to the FWPCA, which were not applicable to the case at hand (see 514 F.2d at 501 n.7 & 527 n.65):

> The term "endangering" as used by Congress in § 1160(g)(1), connotes a lesser risk of harm than the phrase "imminent and substantial endangerment to the health of persons" as used by Congress in the 1972 amendments to the FWPCA.

514 F.2d at 528.

The Eighth Circuit in Reserve Mining referred to the "imminent and substantial endangerment" provision as involving "emergency powers." 514 F.2d at 528 n.70. This was an apt characterization; the genesis of the imminent and substantial endangerment provision shows that it was only intended for true emergency situations.

Although the legislative history of § 7003 of RCRA is sparse, there is reference to the origin of the "imminent and substantial endangerment" standard. The Senate Committee Report notes "this [imminent hazard] provision is substantially identical to that adopted in 1972 as an amendment to the Federal Water Pollution Control Act and incorporated by the Committee in the Clean Air Amendments of 1976. . . ." S. Rep. No. 94-988, 94th Cong. 2d Sess. 15 (1976). In fact, it appears that the imminent hazard provision was present in § 108(k) of the Clean Air Act as enacted in 1967, Pub. L. No. 90-148, 81 Stat. 485 (1967).

Section 108(k) provided for a suit to be brought if there was evidence that a particular pollution source or combination of sources "is presenting an imminent and substantial endangerment to the health of persons. . . ." 81 Stat. 485, 497. The congressional intent behind this provision was clearly spelled out:

> This provision is intended to provide a remedy in an emergency situation. . . . It is not intended as a substitute procedure for chronic or generally recurring pollution problems, which should be dealt with under the other provisions of the act."

H.R. Rep. No. 728, 90th Cong., 1st Sess., reprinted in [1967] U.S. Code Cong. & Ad. News 1938, 1954-1955.32/

The facts of this case simply do not amount to the sort of disastrous emergency situation required for invocation of a provision meant to deal with "imminent and substantial endangerments." The possible existence of

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32/ In sharp contrast to the clearly expressed Congressional intent behind this lineal ancestor of § 7003, the government has recently contended that an imminent hazard for purposes of § 7003 "is the commencement or the continuation of a chain of events which may eventually cause injury." Memorandum in Support of Motion for Preliminary Injunctive Relief, United States v. Petro Processors of Louisiana, Inc., et al., (M.D. La.) (Memo filed July 14, 1980) at 7. This "chain of events" definition, however, is drawn from cases interpreting the phrase "imminent hazard" --as opposed to "imminent and substantial endangerment"--contained in statutory provisions dealing with the registration of various substances. See, e.g., EDF v. EPA, 465 F.2d 528, 535 (D.C. Cir. 1972) (interpreting the Federal Insecticide, Fungicide, and Rodenticide Act); EDF v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971) (same). These provisions involve a "suspension" power, whereby the government has authority to suspend temporarily a license to do business pending administrative hearings which may be judicially reviewed. See EDF v. Ruckelshaus, supra, 439 F.2d at 588-589. This power is but a short-cut for the cancellation of registration of products which fail to conform to safety standards, id., and is not authority to seek remedial relief. Even without the express direction of the Senate Report, reference to the intended meaning of the "imminent and substantial endangerment" standard of the Clean Air Act is clearly more apposite for the instant case.

PAH's in certain St. Louis Park municipal wells has been known to the local authorities since at least 1974. The allegation currently being made that it is necessary to excavate allegedly contaminated soil and to drill barrier wells is the same allegation that was made in connection with the 1970 state litigation. Although certain wells have been closed, the authorities are otherwise allowing water to be used for drinking. Other than the conclusory statements in the complaint that an imminent and substantial endangerment is present, the United States has failed to allege facts showing anything like a situation of emergency proportions. Indeed, the United States has failed to allege how the facts supposedly necessitating its invocation of the emergency authority of § 7003 differ in any substantial way from those involved in the state pollution proceedings against Reilly Tar, a case which has been in litigation for a decade. See Complaint at ¶ 11.[33/] And for further proof that the alleged groundwater pollution in St. Louis Park is far from an emergency, the Court may take judicial notice of a December 10, 1980 news release from the Minnesota Department of

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33/ Nearly two years before the instant "emergency" suit was filed, when EPA included the St. Louis Park site on a list of hazardous waste sites, see EPA Press Release of Nov. 21, 1978, reprinted in Oversight--Resource Conservation and Recovery Act: Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 95th Cong., 2d Sess. 469, 473 (1978)("1978 Hearing"), it was quick to point out that the "sites specifically identified should not be construed as specific sites where there are 'imminent health hazards.' These are simply the ones on which we have the most information." Letter from Thomas C. Jorling, EPA Assistant Administrator for Water & Waste Management, to Hon. Albert Gore, Jr., Dec. 22, 1978, reprinted in 1978 Hearing at 482, 483. Nothing has been shown to have changed since then.

Health, which states that "[a] year long study has produced no evidence that above average breast cancer rates in St. Louis Park, Minn., are related to contamination of the city's water supply . . . ."[34/] Section 7003, like its predecessor provisions in acts like the Clean Air Act, was meant "to provide a remedy in emergency situations," and was "not intended as a substitute procedure for chronic . . . pollution problems."[35/]

The Instant Suit Fails for Lack of Jurisdiction as well as for Failure to State a Cognizable Claim for Relief.

For all of the foregoing reasons, it is apparent that the instant suit against Reilly Tar cannot be maintained under § 7003. Because the terms of that statute have not been met, § 7003 neither authorizes the govern-

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34/ A copy of the news release, together with a cover letter from Stephen Shakman, Special Assistant Attorney General of Minnesota, is attached as Exhibit A.

35/ Statements made by the Director of EPA's Air and Hazardous Materials Division for Region V (which includes Minnesota) in 1978 reflect an awareness of this. In a memo to the Director of the EPA's Hazardous Waste Management Division on June 19, 1978 (reprinted in 1978 Hearing at 314) (emphasis in original), he stated:

> My greatest concern is the manner in which the term "imminent hazard" appears to have become loosely used by headquarters staff. As we are all aware, hazardous waste management facilities are inherently hazardous. Determination of imminent hazard is, in part, a legal matter and must in my view involve a risk of sufficinet magnitude to warrant Federal intrusion into an area that has histcrically been handled by the State and local sector.
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> Investigations under section 7003 should be limited to those of a truly emergency nature. We would be happy to participate with you in developing procedures to implement section 7003 in a more orderly and rational manner.

ment to bring suit against Reilly Tar nor confers jurisdiction on this court to hear such a suit. Moreover, even if such a suit were authorized and jurisdiction conferred by § 7003, because § 7003 is jurisdictional only and the requirements of the federal common law of nuisance have not been met, the complaint fails to state a claim on which relief may be granted.

The government has also alleged that this court has jurisdiction by virtue of 28 U.S.C. §§ 1331 and 1345. These sections provide, in relevant part:

> § 1331. (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws, or treaties of the United States . . . .
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> * * *
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> § 1345. Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

Although § 1331 confers jurisdiction over cases arising under the "laws" of the United States, it has been shown that the instant suit does not arise under either § 7003 or the federal common law. Consequently, no jurisdiction is conferred on this Court by § 1331.

As for jurisdiction under § 1345, the instant suit has been commenced on behalf of the Administrator of the EPA because he is the party upon whom § 7003 confers its authority to sue. But § 1345 confers jurisdiction over suits by or on behalf of officers only if they have been "expressly authorized to sue by Act of Congress," and it has been shown that § 7003 by its terms does not expressly authorize suit under the facts of this case. Thus, no jurisdiction is conferred on this Court by § 1345.

The Relief Sought is Beyond the Scope of § 7003

The extraordinary relief sought by the government against Reilly Tar is both completely disproportionate to the severity of the alleged problem and clearly beyond the authority conferred by § 7003 to seek the immediate restraint of activity which may present an imminent and substantial endangerment. Thus, even if this Court were to find that it has jurisdiction over this suit and that a valid claim for relief has been stated, the relief sought is beyond that contemplated by § 7003, and the prayer of the Complaint should be limited accordingly.

As has been shown above, RCRA § 7003 is a provision designed to deal solely with emergency situations. Once the emergency has passed, authority under § 7003 passes with it. Thus, while a person contributing to a disposal which is presenting an imminent and substantial endangerment may be ordered to stop contributing, and may perhaps be ordered to take such other action as is necessary to abate the emergency, that is as much relief as § 7003 authorizes. Once the emergency is over, any remaining problems must be dealt with through other authority.

Although, as noted above, RCRA's own legislative history sheds little direct light on the subject, the history of a "substantially identical" provision,[36/] § 108(k) of the Clean Air Act, indicates the appropriate scope of any remedy authorized by an imminent and substantial endangerment provision:

> This provision is intended to provide a remedy in an emergency situation. . . . It is not intended as a substitute procedure for chronic or general-

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36/ See S. Rep. No. 94-988, supra, at 16.

> ly recurring pollution problems, which should be dealt with under the other provisions of the act.

H.R. Rep. No. 728, 90th Cong., 1st Sess., reprinted in [1967] U.S. Code Cong. & Ad. News 1938, 1954-55.

There is nothing in the legislative history of RCRA to suggest that Congress intended to authorize anything more than necessary "to immediately restrain" an emergency situation. Congress was not unaware of the scope or magnitude of such problems and their significance to the public. Indeed, these problems were well-known to the Congress. For example, at pages 17-24 of the House Committee Report on RCRA, H. R. Rep. No. 94-1491, supra, 59 episodes of hazardous waste disposal contamination in twenty different states are listed and described. The Committee notes that the list is "merely illustrative of the problem. Far more cases could be cited, even more have gone unreported." Id. Congress found, for example, that "open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land." RCRA § 1002(b)(4), 42 U.S.C. § 6901(b)(4). Yet, open dumping was not prohibited directly, but instead, Congress provided for regulation, inventory, and compliance timetables. RCRA, § 4005, 42 U.S.C. § 6945. Specifically, the objective of RCRA is to prohibit "future open dumping", RCRA, § 1003(3), 42 U.S.C. § 6902(3). Similarly, Congress found that "hazardous waste presents . . . special dangers to health and requires a greater degree of regulation than does non-hazardous solid waste," RCRA § 1002(b)(5), 42 U.S.C. § 6901(b)(5), but the objectives of RCRA are limited to "regulating the treatment, storage, transportation, and disposal of hazardous wastes which

have adverse effects on health and the environment." RCRA, § 1003(4), 42 U.S.C. § 6902(4). With respect to the results of past activities, all that is authorized under new § 3013 is "such monitoring, testing, analysis, and reporting" as is "reasonable to ascertain the nature and extent of [the] hazard." RCRA § 3013(a).

RCRA § 7003 simply does not provide for the sort of general clean-up that the government seeks in its prayer for relief. Even the Solvents Recovery court recognized this, stating that "this court does not view section 7003 as a general 'clean-up statute'," and that "situations which do not present true emergencies are better dealt with through the more comprehensive, if more cumbersome, provisions of RCRA and the EPA regulations promulgated thereunder than in an action under section 7003." United States v. Solvents Recovery Service of New England, supra, 496 F. Supp. at 1143 & n. 29.

If § 7003 is read as authorizing federal imposition of the extensive and extraordinary relief requested in the Complaint, there is serious doubt as to its constitutionality. In Virginia Surface Mining and Reclamation Association, Inc. v. Andrus, 483 F. Supp. 425 (W.D. Va.), prob. jurisd. noted 49 U.S.L.W. 3245 (U.S. Oct. 6, 1980), the court ruled that the extensive remedial provisions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328, which required the restoration of mining land to its original condition, so infringed on the States' traditional governmental function of regulation of land use that it violated the 10th Amendment. The federal government's attempt here to dictate an

extensive remedy to an admittedly intrastate problem of alleged local pollution appears to be of a similar nature.

This court, however, need not address this problem, because there is no "affirmative intention of the Congress clearly expressed," McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963), to authorize the remedies here prayed for under § 7003. Indeed, there is a manifest intention that § 7003 remedies be limited to those strictly necessary to immediately restrain an emergency situation. For that reason, and because an Act of Congress ought not to be so construed as to give rise to serious constitutional questions absent an affirmative intention clearly expressed, NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), this court should rule that the relief sought by the government in its Complaint is not authorized under RCRA § 7003 and therefore dismiss the prayers for relief contained in Paragraphs 3-9 of the Complaint.

CONCLUSION

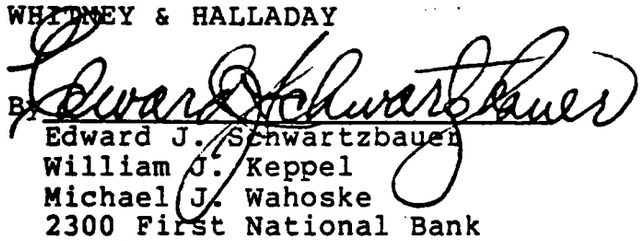
Through this suit against Reilly Tar, the federal government is asking this Court to take jurisdiction of a local controversy currently being prosecuted by the State of Minnesota in its own courts, and to create a new body of federal substantive law in order to give substance to the federal suit. For all of the reasons argued above, this Court should grant defendant Reilly Tar's motion to dismiss this suit for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. At the least, the Court should grant the motion

to dismiss the prayers for relief articulated in Paragraphs 3-9 of the Complaint.

Dated: December 19, 1980.

Respectfully submitted,

DORSEY, WINDHORST, HANNAFORD, WHITNEY & HALLADAY

By 
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